Nos. 78-216, 78-217, and 78-270

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES INDEPENDENT TELEPHONE ASSOCIATION,
Petitioner,
v.
MCI TELECOMMUNICATIONS CORPORATION, et al.,
Respondents.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Petitioner,
v.
MCI TELECOMMUNICATIONS CORPORATION, et al.,
Respondents.

FEDERAL COMMUNICATIONS COMMISSION,
Petitioner,
v.
MCI TELECOMMUNICATIONS CORPORATION, et al.,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE RESPONDENT SOUTHERN PACIFIC COMMUNICATIONS COMPANY IN OPPOSITION

THORMUND A. MILLER
RICHARD S. KOPF
JAMES M. TOBIN
One Market Plaza
San Francisco, Cal. 94105

JOHN V. KENNY
ROBERT W. ROSS
Suite 221
1801 K Street, N.W.
Washington, D.C. 20036

STEPHEN AILES
HERBERT E. FORREST
1250 Connecticut Ave., N.W.
Washington, D.C. 20036

Attorneys for Southern Pacific Communications Company

STEPTOE & JOHNSON
1250 Connecticut Ave., N.W.
Washington, D.C. 20036

Of Counsel

September 26, 1978

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

INDEX

CITATIONS

CITATIONS—Continued

CITATIONS—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-216

UNITED STATES INDEPENDENT TELEPHONE ASSOCIATION,
Petitioner,

v.

MCI TELECOMMUNICATIONS CORPORATION, et al.,
Respondents.

No. 78-217

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Petitioner,

v.

MCI TELECOMMUNICATIONS CORPORATION, et al.,
Respondents.

No. 78-270

FEDERAL COMMUNICATIONS COMMISSION,
Petitioner,

v.

MCI TELECOMMUNICATIONS CORPORATION, et al.,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR THE RESPONDENT SOUTHERN PACIFIC COMMUNICATIONS COMPANY IN OPPOSITION

OPINIONS BELOW

The petitions of the United States Independent Telephone Association (USITA), the American Telephone and Telegraph Company (AT&T), and the Federal Communications Commission (the FCC) involve three interrelated opinions of the United States Court of Appeal for the District of Columbia Circuit in *MCI Telecommunications Corp.* v. *FCC*, familiarly called *Execunet*:[1]

1. *Execunet I*, reported at 561 F.2d 365 (D.C. Cir. July 28, 1977), cert. denied, 434 U.S. 1040 (1978) (AT&T App. I, FCC App. B),[2] reversing a decision of the FCC in *MCI Telecommunications Corp.*, Docket No. 20640, reported at 60 F.C.C.2d 25 (1976);

2. *Execunet II*, not yet officially reported (D.C.Cir. April 14, 1978) (AT&T App. A, FCC App. A), directing compliance with the *Execunet I* mandate of the Court of Appeals; and

3. *Execunet III*, not yet officially reported (D.C.Cir. May 11, 1978) (AT&T App. B, FCC App. E), granting in part and denying in part motions for stay pending certiorari, applications for stay denied by this Court in Nos. A-954 and A-966, not reported (May 22, 1978).

---

[1] *MCI Telecommunications Corp. (Execunet)*, Docket No. 20640, 60 F.C.C.2d 25 (1976), reversed, *MCI Telecommunications Corp.* v. *FCC (Execunet I)*, 561 F.2d 365 (D.C. Cir. July 28, 1977), cert. denied, *United States Independent Telephone Assn.* v. *MCI Telecommunications Corp.*, 434 U.S. 1040 (1978), order directing compliance with mandate *(Execunet II)*, —— F.2d —— (D.C. Cir. Apr. 14, 1978), petitions for rehearing and suggestions for rehearing en banc denied (D.C. Cir. May 8, 1978), motion for stay pending cert. denied, motion for temporary stay pending application to Chief Justice granted *(Execunet III)*, —— F.2d —— (D.C. Cir. May 11, 1978), applications for stay denied, Nos. A-954 and A-966 (U.S. May 22, 1978).

[2] "AT&T App." refers to the appendix of petitioner AT&T in Case No. 78-217, adopted by petitioner USITA in Case No. 78-216. "FCC App." refers to the appendix of the FCC in Case No. 78-270.

JURISDICTION

Petitioners seek review of the opinion and order of the Court of Appeals in *Execunet II* entered April 14, 1978 (AT&T App. A, FCC App. A). Timely petitions for rehearing and suggestions for rehearing en banc were denied by the Court of Appeals on May 8, 1978 (AT&T App. E, FCC App. D). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

The Court of Appeals earlier ruled in *Execunet I* that MCI was authorized without further FCC proceedings to provide to the public a communications service called "Execunet", which required interconnection with AT&T's monopoly local exchange facilities for users to have access to the Execunet circuits. After judicial review had been exhausted, the FCC approved a change of position by AT&T whereby it refused to furnish any further interconnection of its essential monopoly facilities. Under these circumstances, did the Court of Appeals properly rule in *Execunet II* that this action constituted a violation of its mandate, because it frustrated and nullified its *Execunet I* decision by precluding MCI as a practical matter from providing the authorized service to the public?

STATUTE INVOLVED

Sections 201(a) and 214(a) and (c) of the Communications Act of 1934, as amended, 47 U.S.C. 201(a), 214 (a) and (c), provide in pertinent part:

> Sec. 201(a). It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for

hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

Sec. 214(a). No carrier shall undertake the construction of a new line or any extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line * * *.

(c) The Commission shall have power to issue such certificate as applied for, or refuse to issue it, or to issue it for a portion or portions of a line, or extension thereof, or discontinuance, reduction, or impairment of service, described in the application, or for partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require * * *.

STATEMENT

The FCC granted the first applications of Microwave Communications, Inc. (MCI) to construct microwave facilities to provide specialized communications services in 1969.[3] The FCC recognized at that time that MCI's ability to market its service would be dependent on the

[3] *Microwave Communications, Inc.*, Docket No. 16509, 18 F.C.C.2d 953 (1963), recon. denied, 21 F.C.C.2d 190 (1970), modifications granted, 27 F.C.C.2d 380 (1971).

ability of its subscribers to secure local loop service from the telephone companies serving the area, and agreed with the hearing examiner that the "intransigence" of the established carriers was a likely obstacle to essential interconnection.[4] "We have already concluded," the FCC declared, "that a grant of MCI's proposal is in the public interest. We likewise conclude that, absent a significant showing that interconnection is not technically feasible, the issuance of an order requiring the existing carriers to provide loop service is in the public interest." [5]

Following MCI's grant, numerous applications were filed by MCI and its affiliated companies, by Southern Pacific Communications Company (SPCC), and by others, to construct microwave facilities to provide specialized communications services in various parts of the country. After an extensive rule making proceeding in *Specialized Common Carrier Services*,[6] the FCC concluded that a general policy in favor of the entry of new carriers in the specialized communications field would serve the public interest, convenience, and necessity.[7] The FCC also reaffirmed the view expressed in its notice of inquiry that established carriers with exchange facilities should, upon request, permit interconnection or leased channel arrangements on reasonable terms and conditions, and that "where a carrier has monopoly control over essential facilities we will not condone any policy or practice

[4] Id., 18 F.C.C.2d at 965, 1007.

[5] Id., 18 F.C.C.2d at 965, 21 F.C.C.2d at 193.

[6] *Specialized Common Carrier Services*, Docket No. 18920, notice of inquiry, 24 F.C.C.2d 318 (1970), first report and order, 29 F.C.C.2d 870 (1971), recon. denied, 31 F.C.C.2d 1106 (1971), affirmed, *Washington Utilities & Transportation Commission* v. *FCC*, 513 F.2d 1142 (9th Cir. 1975), cert. denied, *National Assn. of Regulatory Utility Commissioners* v. *FCC*, 423 U.S. 836 (1975).

[7] Id., 29 F.C.C.2d at 920.

whereby such carrier would discriminate in favor of an affiliated carrier or show favoritism among competitors." [8]

Thereafter, complaints were filed by specialized carriers that they were unable to secure prompt, adequate, and efficient interconnection of local facilities from AT&T and the Associated Bell System Companies (collectively Bell).[9] A controversy also arose whether Bell was required to furnish interconnection of its monopoly local distribution facilities for all of the specialized carriers' authorized services, including foreign exchange (FX) service and common control switching arrangements (CCSA), which used local exchange facilities providing access to the switched public telephone network. Following proceedings on an order to Bell to show cause, the FCC held in *Bell System Tariff Offerings*:[10] (1) that Bell had been afforded "ample 'opportunity for hearing' to meet the requirements of Section 201(a)" of the Communications Act to support the FCC's interconnection orders;[11] (2) that the FCC's prior orders in *MCI* and *Specialized Carrier Services* covered interconnection of the broad range of services which the specialized carriers were authorized to provide, including FX and CCSA type services;[12] and (3) that Bell had engaged in conduct and practices resulting in denying or unreasonably delaying interconnection with authorized specialized carrier services in violation of the Communications Act and the FCC's declared policy.[13]

[8] Id., 24 F.C.C.2d at 347, 29 F.C.C.2d at 940.

[9] See *AT&T Offer of Facilities for Use by Other Common Carriers*, Docket No. 20099, 52 F.C.C.2d 727 (1975).

[10] *Bell System Tariff Offerings*, Docket No. 19896, order to show cause, 44 F.C.C.2d 245 (1973), decision, 36 F.C.C.2d 413 (1974), affirmed, *Bell Telephone Co. of Pennsylvania* v. *FCC*, 503 F.2d 1250 (3rd Cir. 1974), (AT&T App. G), cert. denied, *AT&T* v. *FCC*, 422 U.S. 1026 (1975), rehearing denied, 423 U.S. 886 (1975).

[11] Id., 46 F.C.C.2d at 417-30.

[12] Id., 46 F.C.C.2d at 419-28.

Bell was ordered to furnish to the specialized carriers "the interconnection facilities essential to the rendition of all of their presently or hereafter authorized interstate and foreign communications services," including FX and CCSA.[14] On review, the Third Circuit affirmed in all particulars,[15] holding that the order was not overbroad in its context in precluding AT&T from discriminating in treating its Long Lines Department and its affiliates differently from specialized carriers.[16]

Under tariff revisions which became effective in October, 1974, MCI began to offer a new metered use service over its authorized facilities which it called "Execunet". AT&T complained to the FCC that MCI was offering ordinary long distance telephone service (called Message Telecommunications Service, or MTS), but was only authorized to provide private line service. The FCC agreed,[17] rejecting the Execunet tariff as unlawful because it had intended in *Specialized Common Carrier Services* to open only private line services to competition by specialized carriers,[18] and because Execunet had characteristics similar to MTS and not to any actual private line service such as FX being offered by any carrier.[19] The essential difference perceived between FX (which was classified as a private line service) and Execunet was that in FX service, one end of MCI's facilities was interconnected

[13] Id., 46 F.C.C.2d at 435-36.

[14] Id., 46 F.C.C.2d at 438.

[15] Id., 503 F.2d 1250 (3rd Cir. 1974), AT&T App. G.

[16] Id., 503 F.2d at 1273, AT&T App. G at 42g.

[17] Note 1 supra, 60 F.C.C.2d 25 (1976).

[18] Id., 60 F.C.C.2d at 36.

[19] Id., 60 F.C.C.2d at 42.

with AT&T's monopoly local exchange facilities in the cities served by MCI's circuits, whereas in Execunet both ends of MCI's facilities were so interconnected.[20]

In a unanimous decision in *Execunet I*, the District of Columbia Circuit reversed.[21] The Court of Appeals rejected the FCC's position that implicit restrictions had been imposed on the facilities authorized to specialized carriers which limited them to providing only "private line" services.[22] The Court of Appeals held that since the FCC had never made an affirmative determination under Section 214(c) of the Communications Act that the public convenience and necessity required that limitations be attached to MCI's authorized facilities, there were no restrictions on the services which might be provided and the FCC could not properly reject the Execunet tariff as offering an unauthorized service.[23] In addition, the Court of Appeals held that unless and until there had been a public interest determination in an appropriate proceeding, there was no present justification for continuing or propagating a de facto or de jure monopoly by AT&T over interstate communications.[24]

This Court denied petitions for certiorari of *Execunet I* on January 16, 1978.[25] On the same day, AT&T announced that it would provide no further interconnection of its monopoly local exchange facilities essential for specialized carriers to furnish authorized Execunet-type

[20] Ibid.

[21] Id., 561 F.2d 365 (D.C. Cir. 1977), AT&T App. I, FCC App. B.

[22] Id., 561 F.2d at 373-77, AT&T App. I at 15i-23i, FCC App. B at 16B-26B.

[23] Id., 561 F.2d at 377-80, AT&T App. I at 23i-30i, FCC App. B at 26B-33B.

[24] Id., 561 F.2d at 379-80, AT&T App. I at 29i-30i, FCC App. B at 31B-33B.

[25] Id., 434 U.S. 1040 (1978).

services to the public, and petitioned the FCC for a declaratory ruling that it was under no obligation to do so. The Department of Justice immediately recognized that the petition was prompted by AT&T's "hope that the Commission would provide the protection from competition which the courts consistently refused to grant to AT&T," and urged that AT&T "cannot be allowed to frustrate MCI's efforts to provide enhanced intercity service by denying access to such local distribution loops."[26]

The FCC granted the ruling requested by AT&T on an expedited basis, holding that *Execunet I* applied only to defining the services authorized under Section 214 of the Act, not to any obligation of AT&T under Section 201(a) of the Act to provide interconnection to enable the carriers to provide their authorized services to the public, and that its own earlier rulings were limited to requiring AT&T to interconnect private line services and did not extend to Execunet-type services.[27] At the same time, the FCC rejected summarily without hearing an Execunet-type offering of SPCC called SPRINT Option V as "a substantive nullity," on the ground that as a practical matter SPCC could not provide this admittedly authorized service to the public because SPCC did not have available the necessary interconnection with AT&T's monopoly local exchange facilities.[28] In both summary rulings, the FCC acknowledged that the issues in determining whether interconnection should be ordered under Section 201(a) of the Act were "essentially identical" to the issues in determining whether limitations should

[26] Comments of the United States Department of Justice, *Bell System Tariff Offerings*, Jan. 30, 1978, at 2-3.

[27] *Petition of AT&T for a Declaratory Ruling and Expedited Relief*, FCC 78-142 (released Feb. 28, 1978), AT&T App. C, FCC App. C.

[28] *Southern Pacific Communications Co., Revisions to Tariff F.C.C. No. 6*, FCC 78-143 (released Feb. 28, 1978).

be imposed on the authorized services of specialized carriers under Section 214(c) of the Act.[29]

On motion by MCI, the Court of Appeals issued an order and opinion in *Execunet II*[30] here under review holding that the Commission's declaratory ruling violated its mandate in *Execunet I*. The Court of Appeals held that its prior decision did clearly contemplate that AT&T was required to provide interconnection for Execunet service, since interconnection was admittedly essential to MCI's ability to offer the service; AT&T had previously interconnected its facilities without objection or question; and AT&T had represented that if *Execunet I* became effective, the decision in and of itself would necessarily lead to vigorous and adverse competition.[31] The Court declared that the FCC's construction was "plainly inconsistent", in "indirect and explicit contradiction", and "wholly at odds" with its decision, and that it "twists the issues * * * beyond recognition" and "deliberately frustrates" the purpose, basis, and intended effect of *Execunet I*, contrary to the expansive interpretation required by earlier decisions.[32] The Court further held that the Third Circuit's decision in *Bell Telephone Co. of Pennsylvania*[33] provided strong support, not conflicting authority, for a broad construction requiring Execunet-type interconnection, since Execunet required virtually the same form of interconnection as provided for FX service, and admittedly AT&T was under an obligation to

[29] Note 27 supra, FCC 78-142 at ¶ 61, AT&T App. C at 36c-37c, FCC App. C at 41c-42c; note 28 supra, FCC 78-143 at ¶ 28.

[30] Note 1 supra, *Execunet II*, AT&T App. A, FCC App. A.

[31] Id., AT&T App. A at 9a-10a, FCC App. A at 12A-13A.

[32] Id., AT&T App. A at 11a, 13a, 15a, FCC App. A at 14A, 16A, 18A.

[33] Note 9 supra, 503 F.2d 1250 (3rd Cir. 1974), AT&T App. G.

interconnect with services beyond those traditionally considered "private line."[34]

Petitions for rehearing of *Execunet II* and suggestions for rehearing en banc were denied by the Court of Appeals without any judge requesting that a vote be taken on en banc consideration.[35] The Court of Appeals also denied a motion for stay pending petitions for certiorari, but granted a temporary stay to permit applications to the Circuit Justice for a stay, while issuing another opinion *(Execunet III)* on the issues and the reasons why it believed the arguments raised once again to be wholly without merit.[36] Applications for a stay pending certiorari were denied by this Court.[37]

Petitions for certiorari have been filed by USITA, AT&T, and the FCC, with Commissioner Fogarty issuing a statement (Appendix A attached to this brief) dissenting to the FCC's decision to seek certiorari.

[34] Note 1 supra, *Execunet II*, AT&T App. A at 19a-22a, FCC App. A at 22A-24A.

[35] Note 1 supra (D.C. Cir. May 8, 1978), AT&T App. E, FCC App. D.

[36] Note 1 supra (D.C. Cir. May 11, 1978), AT&T App. B, FCC App. E.

[37] Note 1 supra, Application Nos. A-954, A-966 (U.S. May 22, 1978).

ARGUMENT

1. The Court of Appeals properly held that the refusal to provide further interconnection violated its mandate in *Execunet I*. In *Execunet I*, the Court of Appeals held that specialized carriers are authorized to provide Execunet-type services without limitation over their authorized lines in competition with AT&T's interstate services, and that there is no present justification for preserving to AT&T a de facto or de jure monopoly in communications. As a necessary part of its mandate, the decision clearly contemplated that AT&T would continue to interconnect its monopoly local exchange facilities essential to the carriers' ability to furnish the authoried services to the public.

In describing Execunet, the Court of Appeals adverted to "local exchange telephone service" at both terminals as a necessary part of the service.[38] "Strikingly absent" from the list of procedures to challenge the availability of specialized carrier service offerings was not only any mention of further Section 214 proceedings,[39] but also of Section 201(a) proceedings.[40] The Court below explicitly recognized that under the statutory scheme, a carrier "should in general be free to initiate and *implement* new rates or services over existing communications lines", absent a prior adverse determination (emphasis in original).[41]

Likewise, throughout the *Execunet I* proceedings AT&T freely provided interconnection to MCI without protest, objection, or suggestion that it was not required to do so. Indeed in pleadings to the Court below and to this Court,

[38] Note 1 supra, 561 F.2d at 367 fn. 3, AT&T App. I at 2 fn. 3.

[39] Id., 561 F.2d at 379, AT&T App. I at 27i-28i.

[40] See ibid.

[41] Id., 561 F.2d at 374, AT&T App. I at 18i.

AT&T represented that *Execunet I* would lead to vigorous and adverse competition without any indication that it would seek to thwart this result by interposing a refusal to interconnect.[42] A party may not reserve for another round of litigation a point which could and should have been raised during pendency of an action to reverse a Commission order, by remaining silent on the issue until certiorari has been denied.[43]

The Court of Appeals recognized that the FCC ruling that AT&T is under no obligation to furnish further interconnection "deliberately frustrates the purpose of the litigation, the basis on which it was presented by the parties, and the intended effect of our decree."[44] The FCC itself acknowledged in the contemporaneous rejection of SPRINT Option V, an SPCC Execunet-type service, that the effect of its ruling was to make *Execunet I* a "substantive nullity" by making it impossible for the carrier as a practical matter to furnish its authorized service.[45] AT&T and the FCC thus sought to leave the specialized carriers with Court-affirmed authorizations to provide Execunet-type services over their authorized facilities, but without the means to offer these services to the public.

In the exercise of its jurisdiction to interpret and enforce its own orders, the Court of Appeals issued its order under review directing compliance with its mandate because the FCC's analysis and decision were "plain-

[42] Id., *Execunet II*, AT&T App. A at 9a-10a, FCC App. A at 12A-13A; *Execunet III*, AT&T App. B at 6b, FCC App. E at 6E-7E.

[43] *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320, 339 (1958); *Colorado River Corp.* v. *FCC*, 118 F.2d 24, 26 (D.C. Cir. 1941).

[44] Note 1 supra, *Execunet II*, AT&T App. A at 15a, FCC App. A at 18A.

[45] Note 28 supra.

ly inconsistent with" [46] and "in direct and explicit contradiction to" [47] the Court's analysis and ruling in *Execunet I*: (1) the FCC's position that the *Specialized Carrier* decision excluded Execunet-type services from consideration was in explicit contradiction to the holding in *Execunet I*; [48] (2) the FCC's narrow interpretation was directly at odds with the broad interpretation in *Execunet I* that specialized carriers were authorized to enter the market and compete with AT&T, subject only to any possible later limitations based on public interest determinations;[49] and (3) *Execunet I* was wholly consistent with and supported by the Third Circuit decision in *Bell Telephone Co. of Pennsylvania.*[50] An administrative agency, like a trial court, is "without power to do anything which is contrary to either the letter or the spirit of the mandate" of an appellate court of higher authority, and "the higher tribunal is amply armed to rectify any deviation" from its binding decision.[51]

It is clear from the tenor of the petitions for certiorari that the quarrel of petitioners is essentially with the decision of the Court of Appeals in *Execunet I* holding

[46] Note 1 supra, *Execunet II*, AT&T App. A at 11a, FCC App. A at 14A.

[47] Id., *Execunet II*, AT&T App. A at 13a, FCC App. A at 16A; *Execunet III*, AT&T App. B at 5b, FCC App. E at 5E.

[48] Id., *Execunet II*, AT&T App. A at 13a, FCC App. A at 16A; *Execunet III*, AT&T App. B at 4b-5b, FCC App. E at 5E.

[49] Id., *Execunet II*, AT&T App. A at 13a-15a, FCC App. A at 16A-18A; *Execunet III*, AT&T App. B at 5b, FCC App. E at 5E.

[50] Id., *Execunet II*, AT&T App. A at 15a-20a, FCC App. A at 18A-24A; *Execunet III*, AT&T App. B at 5b-8b, FCC App. E at 5E-9E.

[51] *City of Cleveland, Ohio* v. *FPC*, 561 F.2d 344, 346 (D.C. Cir. 1977); *Yablonski* v. *UMW*, 454 F.2d 1036, 1038 (D.C. Cir. 1971), cert. denied, 406 U.S. 906 (1972); *Thornton* v. *Carter*, 109 F.2d 316, 320 (8th Cir. 1940).

Execunet was an authorized service.[52] Certiorari having been denied, however, the final judgment of the Court of Appeals was effective and binding,[53] and the FCC was bound to act upon the Court's corrections of its errors of law,[54] giving full effect to its duties in harmony with the views expressed by the Court.[55] What the FCC sought to do upon remand was not to enforce the legislative policy committed to its charge [56] consistent with the Court's mandate. Instead, as the Court below pointed out, the FCC's declaratory ruling was not based on considerations of the public interest, but rather reflected only the FCC's interpretation of statutory provisions of the Communications Act and earlier decisions of the FCC, the Third Circuit, and *Execunet I* directly inconsistent with the Court's judicial interpretation.[57] Thus the Court did not seek as in *Vermont Yankee* to impose its own notions of proper procedures beyond rules governing the agency because it was "unhappy with the result reached," [58] but to the contrary interdicted an action by

[52] E.g., "The court of appeals continues in this case to make and implement important communications policy. * * * *Execunet I* * * * drastically expanded the FCC's competition policy to include services the FCC had not intended to embrace in its policy." (FCC Pet. 5.) "[I]n its trio of *Execunet* decisions the court below has seriously misread the statutes involved, has usurped the Commission's authority * * *, and has precluded responsible exercise of that authority by the agency * * *" (USITA Pet. 9.)

[53] *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320, 340-41 (1958).

[54] *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 145 (1940).

[55] *SEC* v. *Chenery Corp.*, 332 U.S. 194, 200 (1947); *Ford Motor Co.* v. *NLRB*, 305 U.S. 364, 374 (1939); *FRC* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 278 (1933).

[56] Note 54 supra, 309 U.S. at 145.

[57] Note 1 supra, *Execunet III*, AT&T App. B at 8b-9b, FCC App. E at 9E-10E.

[58] *Vermont Yankee Nuclear Power Corp.*, v. *National Resources Defense Council, Inc.*, 98 S.Ct. 1197, 1219 (1978).

the FCC which it found "deliberately frustrates * * * the intended effect" of the Court's decree [59] by attempting to circumvent the Court's statutory construction because it was dissatisfied with the Court's conclusions.[60]

2. The decision below is not in conflict with the decision of the Third Circuit. The decision of the Court below under review is only one of a series of recent cases, including *Bell Telephone Co. of Pennsylvania*,[61] upholding the *extension* of competition by new entrants in services and facilities heretofore offered only by the telephone companies, and *affirming* the obligation of telephone companies to furnish interconnection of their monopoly local exchange facilities essential for the provision of the services and facilities by the new competitors.[62]

On three occasions the Court below has considered and rejected the arguments of petitioners that its *Execunet* decisions are somehow in conflict with the decision of the Third Circuit in *Bell Telephone Co. of Pennsylvania*, and to the contrary concluded that the Third Circuit decision affirmatively supports the rulings of the District of Columbia Circuit.[63] Drawing upon the consistent earlier rulings of the FCC that established carriers with ex-

[59] Note 1 supra, *Execunet II*, AT&T App. A at 15a, FCC App. A at 18A.

[60] Cf. *AT&T* v. *FCC*, 487 F.2d 864, 880, 881 (2d Cir. 1973).

[61] Note 9 supra.

[62] *Washington Utilities & Transportation Commission* v. *FCC*, note 6 supra; *North Carolina Utilities Commission* v. *FCC*, 537 F.2d 797 (4th Cir. 1976), cert. denied, 429 U.S. 1027 (1976); *North Carolina Utilities Commission* v. *FCC*, 552 F.2d 1036 (4th Cir. 1977), cert. denied, 434 U.S. 874 (1977); *Bell Telephone Co. of Pennsylvania* v. *FCC*, note 9 supra; *AT&T* v. *FCC*, 539 F.2d 767 (D.C. Cir. 1976); *People of State of California* v. *FCC*, 567 F.2d 84 (D.C. Cir. 1977), cert. denied, 434 U.S. 1010 (1978).

[63] Note 1 supra, *Execunet I*, 561 F.2d at 377-78 fn. 59, AT&T App. I at 24i-25i fn. 59, FCC App. B at 26B-27B fn. 59; *Execunet II*, AT&T App. A at 15a-20a, FCC App. A at 18A-24A; *Execunet III*, AT&T App. B at 7b-8b, FCC App. E at 7E-9E.

change facilities should upon request permit interconnection on reasonable terms and conditions, and that "where a carrier has monopoly control over essential facilities we will not condone any policy or practice whereby such carriers would discriminate in favor of an affiliated carrier or show favoritism among competitors," [64] the Third Circuit affirmed the FCC's ruling that its "prior orders covered interconnection for the broad range of services which the specialized carriers are authorized to provide." [65] *Execunet II* and *Execunet III* point out that the Third Circuit's decision buttresses the District of Columbia Circuit's own views, because the interconnection required in *Bell Telephone Co. of Pennsylvania* for FX and CCSA was for facilities virtually identical to that required for Execunet;[66] there was no explicit mention of FX or CCSA, just as there was no reference to Execunet services, in the earlier decisions;[67] and the authorizations encompassed by the FCC's prior decisions extended not only to new and innovative services but also to services in direct competition with those offered by AT&T.[68]

The argument of petitioners that *Execunet II* is in conflict with the Third Circuit opinion hinges on language in *Bell Telephone Co. of Pennsylvania* that AT&T's obligation to interconnect was not unbounded because it read the FCC order to require AT&T to provide to the special-

[64] Note 9 supra, 503 F.2d at 1254-59, AT&T App. G at 3g-12g.

[65] Id., 503 F.2d at 1259, AT&T App. G at 12g, affirming 46 F.C.C.2d at 426-27.

[66] Note 1 supra, *Execunet II*, AT&T App. A at 19a, FCC App. A at 23A; *Execunet III*, AT&T App. B at 7b, FCC App. E at 8E.

[67] Id., *Execunet II*, AT&T App. A at 17a, FCC App. A at 21A; *Execunet III*, AT&T App. B at 7b, FCC App. E at 8E.

[68] Id., *Execunet II*, AT&T App. A at 17a-18a fn. 31, FCC App. A at 21A fn. 31; *Execunet III*, AT&T App. B at 8b, FCC App. E at 9E. Cf. *AT&T* v. *FCC*, 539 F.2d 767 (D.C. Cir. 1976).

ized carriers "those (interconnection) elements of private line services which AT&T supplies to its affiliates and furnishes to customers through its Long Lines Department." [69] However, as the Court below carefully pointed out, the Third Circuit was concerned not with uncertainty as to the services the specialized carriers themselves would provide, but with the types of services AT&T might be required to provide "hereafter"—an irrelevant consideration in this case, since the forms of interconnection for FX and Execunet are virtually identical.[70] Furthermore, the FCC itself recognized that the term "private line services" was only a shorthand or abbreviated expression encompassing a broader range of services beyond those traditionally considered private line.[71] The obligation of AT&T to interconnect ran to all of the specialized carriers' authorized services, and under the *Specialized Carrier* decision as interpreted in *Execunet I* this included Execunet-type services.[72]

The Third Circuit decision in *Bell Telephone Co. of Pennsylvania* also settled the issue sought to be revived by petitioners (AT&T Pet. 12; FCC Pet. 3) that an evidentiary hearing was required before interconnection could be mandated. Following the principle established by this Court in *Allegheny-Ludlum* [73] and *Florida East*

---

[69] Note 9 supra, 503 F.2d at 1273-74, AT&T App. G at 42g.

[70] Note 1 supra, *Execunet II*, AT&T App. A at 19a, FCC App. A at 22A-23A.

[71] Id., *Execunet II*, AT&T App. A at 19a-20a, FCC App. A at 23A; *Execunet III*, AT&T App. B at 8b, FCC App. E at 9E, citing *Petition of AT&T for a Declaratory Ruling and Expedited Relief*, FCC 78-142 ¶ 59, AT&T App. C at 34c-35c, FCC App. C at 39c-40c.

[72] Note 1 supra, *Execunet I*, 561 F.2d at 379, 380, AT&T App. I at 28i, 30i, FCC App. B at 31B, 32B.

[73] *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 757 (1972).

Coast Ry.,[74] the Third Circuit held that the statutory requirement of "an opportunity for hearing", absent reference to "a hearing on the record", was satisfied by less formal and adversarial procedures appropriate to establishing a general policy requiring AT&T to interconnect its monopoly local exchange facilities to all the authorized services of the specialized carriers.[75]

3. Review by this Court would be premature. As the Court below has pointed out, no justification has been established for allowing AT&T to maintain its de facto monopoly over interstate communications, or for preventing the specialized carriers from exercising their right established by relevant agency and judicial precedents to enter the specialized communications market now.[76] The FCC has conceded that the public interest issues to be resolved in determining whether AT&T must interconnect Execunet-type services are "essentially identical" to the public interest issues in determining whether specialized carriers should be authorized to provide Execunet-type services.[77] The FCC has embarked upon a comprehensive rule making proceeding to examine precisely those broad issues of competition and the public interest raised by the introduction of services such as Execunet.[78] Until the FCC has had an opportunity to make an informed decision whether competition should be circumscribed under public interest standards, based upon a specific factual record and not upon unsupported assumptions and vague suppositions, there is no adequate

---

[74] *United States* v. *Florida East Coast Ry. Co.*, 410 U.S. 224 (1973).

[75] Note 9 supra, 503 F.2d at 1263-68, AT&T App. G at 22g-32g.

[76] Note 1 supra, *Execunet III*, AT&T App. B at 8b-9b, FCC App. E at 9E-10E.

[77] Note 29 supra.

[78] *MTS and WATS Market Structure*, FCC 78-144 (1978).

foundation for restricting specialized carriers from furnishing presently authorized services or for review by this Court of a priori limitations which petitioners seek to impose.

While the petitions for certiorari turn on the asserted differences betwen "private line" services and ordinary switched public telephone services, it has been recognized by representatives of the telephone industry itself that the distinction has become increasingly ephemeral: [79]

> Although the FCC has subsequently [after the *Specialized Carrier* decision] attempted to more closely define the services open to competition, it has become apparent that no clear distinction can be made between the competitive "private line service" and monopoly Message Telecommunications Service market. In economic terms, the two types of services are strong substitutes for one another, especially for large volume business users who constitute a significant portion of the Message Telecommunications Service market. In technological terms, too, the distinction between "private line service" and "Message Telecommunications Service" is rapidly dissipating.

Current hearings on a bill to rewrite completely the provisions under which telecommunications is regulated by Federal statute [80] disclose a strong tide in favor of competition in all aspects of interstate communications. The bill itself is designed, in the provision of domestic common carrier service, to place maximum feasible reliance on market place forces; to promote nationwide basic voice telephone service at affordable rates; to rely on competition to provide efficiency, innovation, and low rates,

[79] *The Dilemma of Telecommunications Policy, An Inquiry into the State of Domestic Telecommunications by a Telecommunications Industry Task Force*, at III 6-7 (1967). Cf. Statement of Commissioner Washburn in *MTS and WATS Market Structure*, note 77 supra.

[80] H.R. 13015, 95th Cong., 2d Sess. (1978).

and to determine the variety, quality, and cost of telecommunications services; to establish full and fair competitive conditions; and to prevent practices by any carrier to limit or exclude competition.[81] The Chairman of the FCC has emphasized the importance and his support for this "clear Congressional mandate that competition in telecommunications should be the rule and monopoly the exception." [82]

There are no special or important reasons for review by this Court on a writ of certiorari of the question presented whether the Court of Appeals correctly interpreted its own opinion in directing compliance with its mandate. Conversely, the specialized carriers should not be deprived of their present opportunity afforded them under existing authorizations to offer services to the public which the Court of Appeals has ruled to be permissible, after its judgment became final and effective upon the denial of certiorari.

[81] Id., Sec. 331.

[82] Statement of Charles D. Ferris, Chairman, Federal Communications Commission, on the International and Domestic Common Carrier Provisions of H.R. 13015, before the Subcommittee on Communications of the House Committee on Interstate & Foreign Commerce (Aug. 9, 1978) at 2-3.

CONCLUSION

For the foregoing reasons, the petitions for a writ of certiorari should be denied.

Respectfully submitted,

THORMUND A. MILLER
RICHARD S. KOPF
JAMES M. TOBIN
One Market Plaza
San Francisco, Cal. 94105

JOHN V. KENNY
ROBERT W. ROSS
Suite 221
1801 K Street, N.W.
Washington, D.C. 20036

STEPHEN AILES
HERBERT E. FORREST
1250 Connecticut Ave., N.W.
Washington, D.C. 20036
Attorneys for Southern Pacific Communications Company

STEPTOE & JOHNSON
1250 Connecticut Ave., N.W.
Washington, D.C. 20036
Of Counsel

APPENDIX

APPENDIX

FEDERAL COMMUNICATIONS COMMISSION

6065

August 10, 1978—CC

COMMISSIONER FOGARTY DISSENTS TO SEEKING SUPREME COURT REVIEW OF *MCI TELECOMMUNICATIONS CORP.* V. *FCC*

Commissioner Joseph R. Fogarty today issued the following statement regarding the Commission's decision to seek Supreme Court review of *MCI Telecommunications Corporation* v. *FCC*, FCC 76-1635 (D.C. Circuit 1978):

The Commission has decided to seek certiorari of the Court of Appeals decision granting MCI's Motion to Enforce Mandate. The court in that decision reversed the Commission's determination that the telephone companies are not obligated to provide MCI with local exchange facilities to use in connection with Execunet service, a decision to which I dissented. I dissented also to the determination to seek rehearing before the Court of Appeals *en banc*, and I disagreed with the decision to ask the Supreme Court for a stay. Subsequently, both the Court of Appeals and the Supreme Court rejected the Commission's requests.

Nevertheless, the Commission refuses to accept this decision and seeks, without sound basis, in my opinion, to obtain Supreme Court review. For that reason, I dissent to the decision to seek certiorari. Since my reasons for dissent are the same as those I set forth in opposing rehearing, I am attaching the statement which I issued at that time.

—FCC—

Attachment

STATEMENT OF COMMISSIONER JOSEPH R. FOGARTY

In Re: Motion for Stay of the United States Court of Appeals Order Directing Compliance With *Execunet* Mandate.

The Commission has filed a motion for stay and said it will seek rehearing before the United States Court of Appeals for the District of Columbia *en banc*, of the Court's April 14, 1978,[1] grant of MCI Telecommunications Corporation's Motion for an Order Directing Compliance with Mandate in the Court's *Execunet* decision.[2] I believe it is improper and counterproductive to continue this litigation any further, following two reversals by the Court of Appeals and denial of review by the Supreme Court. Enough is enough. I would devote all available resources of this Commission now to expedite determination of a reasonable competitive market structure for domestic telecommunications services. Rehearing is being sought of an Order which, in essence, requires the FCC to direct and the telephone companies to furnish those interconnections and local facilities required for the provision of MCI's *Execunet* service offering.[3] In doing so, the Court also found that its

[1] MCI Telecommunications Corp. v. FCC, —— F.2d ——, No. 75-1635.

[2] MCI Telecommunications Corp. v. FCC, 561 F.2d 365, (D.C. Cir., 1977), cert. denied, —— U.S. ——, 46 U.S.L.W. 3446 (Jan. 16, 1978).

[3] "Execunet's characteristics are summarized as follows. A customer in the calling city calls the local MCI office via local exchange telephone service from any push-button telephone in the local exchange area. A rotary-dial telephone can also be used if the caller has a touch-tone pad (tone generator). This device can be purchased in the open market from numerous sources. He then pulses his customer code and the area code and calling number of any telephone in one of a number of distant cities. Connection at the distant end may again be accomplished via the local exchange telephone service in that area. Upon connection, the customer is charged a per-minute

prior *Execunet* decision[4] required such interconnections, despite a declaratory ruling by the Commission, to which I dissented, that such interconnections were not mandated by Section 201(a) of the Communications Act, 47 U.S.C. § 201(a).[5]

In Order to understand the import of the April 14 decision, it is necessary to examine briefly the legal basis of our competitive service policy. Our 1971 *Specialized Common Carrier* decision[6] declared that it is the Commission's policy to promote "full and fair competition" among established and new "specialized" carriers for the provision of "specialized common carrier services." That decision cleared the way for the grant of a number of facilities applications to several newly emerging common carriers, including MCI. Both in that case and in the subsequent *Bell System Tariff Offerings*,[7] we determined that the specialized carriers were limited to the offering of specialized, particularly private line, services.[8]

AT&T subsequently refused to supply interconnections for the offering of foreign exchange (FX) and common

toll, based upon the mileage to the city called, subject to a connection charge and a monthly minimum charge. Any MCI Execunet customer in the calling city can access the system at any time to place a call, and presumably many such customers may utilize the intercity facilities simultaneously. In other words, none of the MCI plant, or indeed any of the plant used in completing the call, is dedicated to the use of a particular customer during any specified time; rather it is available upon demand." MCI Telecommunications Corp. 60 FCC 2d 25, 26n (1976).

[4] *Supra*, note 2.

[5] —— F.2d ——, FCC 78-142, released February 28, 1978.

[6] 20 FCC 2d 870 (1971), aff'd sub nom Washington Utilities and Transportation Commission v. FCC, 513 F.2d 1142 (2d Cir. 1975), cert. denied, 423 U.S. 836 (1975).

[7] 46 FCC 2d 413 (1974), aff'd sub nom Bell Telephone Company of Pennsylvania v. FCC, 503 F.2d 1250 (3d Cir., 1974), cert. denied, 422 U.S. 1026 (1975).

[8] See MCI Telecommunications Corp., 60 FCC 2d 25, 36 (1976).

control switching arrangement services (CCSA). Upon complaint, we hold that FX and CCSA were authorized private line services and that the *Specialized Carrier* decision, *supra*, could reasonably be read to grant those interconnections, pursuant to Section 201(a) of the Act, "essential to the rendition of all of their presently or hereafter authorized interstate and foreign communications services and to enable the said specialized common carriers to terminate their authorized interstate and foreign communications services." [9]

AT&T appealed the Commission's interconnection order, asserting among other arguments that our opinion was "somewhat vague and, to a certain extent, overbroad." [10] The Third Circuit affirmed the Commission, however, holding that, when read in the context of the *Specialized Common Carrier* decision, our intention had been for interconnection to be required only in connection with the offering of specialized common carrier services. "Orders are not to be read in a vacuum, but rather must be read and interpreted in the context in which they appear." [11]

When MCI began offering its Execunet tariff, AT&T did not refuse to provide interconnections, but rather filed a complaint seeking a ruling that the service was outside of those which MCI's authorizations allowed it to offer. After hearing, we agreed and ruled the MCI tariff to be null and void.[12] We found Execunet to be not private line but essentially long distance message telecommunications service (MTS) and outside of the

[9] Bell System Tariff Offerings, *supra* note 7, 46 FCC 2d at 438.

[10] *Supra*, note 7, 503 F.2d at 1273.

[11] *Id.*

[12] MCI Telecommunications Corp., 60 FCC 2d 25 (1976), rev'd sub nom MCI Telecommunications Corp. v. FCC, *supra*, note 2.

scope of those services which the specialized carriers were permitted to provide.

Our holding in this regard was overturned in the first of the court reversals relating to this question. The Court of Appeals told us that the *Specialized Common Carrier* decision did not limit services which MCI could offer, but rather such limitations could be imposed only after public interest findings were made based upon a complete record. In developing such a record, the Court cautioned, "the Commission must be ever mindful that, just as it is not free to create competition for competition's sake, it is not free to propagate monopoly for monopoly's sake." [13]

Significantly, it was not until *after* denial of review by the Supreme Court that AT&T refused to provide interconnections. The Commission agreed that 201(a) did not require the furnishing of local facilities to MCI when it granted AT&T's declaratory ruling petition. In dissenting from that ruling, I wrote, "Clearly, the D.C. Circuit's findings would be a nullity were we to deny interconnection necessary for the provision of [Execunet]. *Bell System Tariff Offerings* held that *Specialized Common Carriers* mandated interconnections necessary for services authorized therein, and the *Execunet* court found these services unrestricted. Since Execunet-type services are presently authorized, these cases read together mandate interconnection."

Now we are faced with what amounts to a Court of Appeals reversal of the declaratory ruling, with a direction to the Commission to comply with the Court's *Execunet* mandate. Yet the Commission still insists on retrying the *Execunet* case, this time by seeking a stay and rehearing. It persists in this effort despite language in the April 14 Court Order, which I find very disturb-

[13] 561 F.2d at 380.

ing, that the Commission's Declaratory Ruling "twists the issues we contemplated in this case beyond recognition; it deliberately frustrates the purpose of this litigation, the basis on which it was presented by the parties, and the intended effect of our decree." [14] The Court also cites AT&T's efforts to thwart the development of MCI's services, then says that now "we are faced with a new effort by AT&T, with the approval of the Commission, to arrest development of Execunet service."[15]

Whiie I am certain that my colleagues believe that a rehearing request has a reasonable chance of success, I cannot agree. Instead, the attempt to relitigate these same issues on which we were reversed in *Execunet* will further alienate a Court which already has expressed the view that this Commission is acting "in direct and explicit contradiction to our *Execunet* decision." [16]

The FCC has accepted losses before—without devastating consequences. Certainly, it has had a multitude of court reversals in the cable and broadcast areas. It is time now for a mature Commission to accept the *Execunet* decisions and to move ahead affirmatively to define and resolve the issues in CC Docket No. 78-72, our MTS/WATS market structure investigation, and thus to remove as quickly as possible the uncertainties surrounding the scope of inter-city competition.

Meanwhile, we are under a Court direction to enforce the *Execunet* mandate. In doing so, I would ensure that AT&T complies by issuing a show cause order in the event it does not provide MCI with local interconnections and facilities necessary for the provision of Execunet service within a reasonable time at just and reasonable rates.

---

[14] Slip opinion, pp. 15-16.

[15] Slip opinion, p. 3.

[16] Slip opinion, p. 14.